No. 18446

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BILLY MAURICE OGDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

The indictment in this case was returned on September 9, 1959. The offense consisted of false statements made by the appellant to the Air Force on a Certificate of Non-Affiliation with Certain Organizations in violation of Title 18, United States Code, Section 1001. The appellant was first tried and convicted by a jury in July of 1960 before the Honorable Harry C. Westover, United States District Judge. Subsequently, on September 26, 1960, the District Court filed an opinion ruling that appellant had been deprived of a fair trial because of the Court's erroneous instruction in ruling as a matter of law that the Certificate constituted a material matter within the jurisdiction of the Air Force and further because of the

Court's failure to require the Government to be more specific as to time, place, events, and the names of people present in its bill of particulars, and furthermore for refusing to grant a continuance at the end of the Government's case upon the request of counsel to prepare for the defense. On October 3, 1960, the District Court denied the pending motion of defendant-appellant for judgment of acquittal and the motion of defendant-appellant for arrest of judgment.

Appellant filed a notice of appeal on October 11, 1960, from these denials of the District Court.

On December 27, 1960, upon the motion of appellee, the appeal from the order of the court denying the judgment of acquittal and the motion in arrest of judgment was dismissed by this court. The mandate of this court was filed, endorsed and entered December 28, 1960.

The second trial of the case took place in Los Angeles in January, 1961. On January 12, 1961, the jury returned a verdict of guilty on both counts charging appellant with making false statements to the Air Force on a Certificate of Non-Affiliation with Certain Organizations in violation of Title 18, United States Code, Section 1001.

On February 13, 1961, appellant was sentenced to two years in prison on each count to run concurrently and appeal bond of $1,000 was fixed, and subsequently posted on February 14, 1961. Notice of Appeal was timely filed on February 17, 1961.

The case was argued on the merits before this court on December 6, 1961, before Chief Circuit Judge

Chambers, and Circuit Judges Merrill and Browning. This Court rendered its decision on May 16, 1962 which read in part:

> "The judgment will be vacated and the cause remanded to permit the trial court to conduct a hearing and consider such extrinsic evidence as may be necessary to enable the court to determine whether the notes referred to by Glass constituted a 'statement' within the meaning of the Act, and, if so, what became of them. A new trial will be required only if the Court, after hearing, concludes that a producible statement by Glass existed, and that the substantial rights of the defendants were affected by failure to make that statement available for defendant's use in the cross-examination of the witness. Assuming that the trial court determines that a Jencks Act statement once existed, the Court may nonetheless conclude that the substantial rights of the defendant were not affected by its non-production if the same information was available to the defendant in the signed statement of March, 1958, or if the statement was destroyed in accordance with normal practice before the prosecution of defendant was contemplated, for a sufficient reason wholly unrelated to the prosecution, in good faith and with no intention to suppress evidence. If a new trial is denied, the District Court will enter a new final judgment, thus preserving defendant's right to appellate review of the District Court's action."
>
> *Ogden v. United States,* 303 F. 2d 724 (1962) at pp. 737-738.

The hearing was held by the trial court on October 8 and 9, 1962, at Los Angeles, California. The Court entered its Findings of Fact, Conclusions of Law, and Judgment in the matter on November 9, 1962. The appellant filed a Notice of Appeal on November 16, 1962, from the judgment entered on November 9, 1962. The appellant filed a subsequent Notice of Appeal on November 28, 1962, from the judgment of November 9, 1962.

II.
STATEMENT OF FACTS.

The Findings of Fact entered on the docket by the trial court on November 9, 1962, sufficiently set forth all relevant facts incident to the present appeal. We quote them:

"FINDINGS OF FACT

I.

"On or about March 21, 1958, Special Agent Ralph M. Lindsey and Special Agent Cornelius M. Sullivan of the Federal Bureau of Investigation, interviewed Albert Raymond Glass at his home in Mill Valley, California.

II.

"The purpose of this interview was to elicit from Mr. Glass any information which he knew relative to the conduct of defendant, Billy Maurice Ogden, whom Glass had met while he was enrolled at the University of Oklahoma in 1947.

III.

"The interview commenced at approximately 9:00 P.M. and lasted approximately two hours. Mrs. Arlene B. Glass, the wife of Albert Raymond Glass, was in the home during the period of the interview but did not remain continuously in the presence of the special agents while the interview was being conducted, although she entered the room at various times.

IV.

"During the course of this interview, Special Agent Sullivan took handwritten notes of the pertinent portions of the conversation. Certain portions of the interview related to social amenities and to Mr. Glass's artistic endeavors which portions were not reduced to notes. Special Agent Lindsey took no notes during the course of this interview. Neither agent made a mechanical or electrical recording of the conversation.

V.

"In order to resolve all doubt in favor of the defendant, Billy Maurice Ogden, the Court finds that the witness, Glass, examined and initialed that evening each page of the handwritten notes taken by Agent Sullivan.

VI.

"Special Agent Sullivan, in the normal course of his duties, went to the Federal Bureau of Investigation office in San Francisco, California, two or three days after the interview, and dictated directly from his notes to a secretary, Agnes Find-

ley, at which time Agnes Findley typed the two-page statement identified at this hearing as Exhibit B.

VII.

"Special Agent Sullivan then compared the original handwritten notes with the two-page typewritten statement (Hearing Exhibit B) to satisfy himself that all the material in the handwritten notes had been transcribed into the two-page typewritten form. The next day he returned to the San Rafael field office and destroyed the original handwritten notes by tearing them up and throwing them in a waste paper basket. The destruction of the notes under these circumstances was in accordance with the then existing Federal Bureau of Investigation Rules and Regulations as set forth in Hearing Exhibit E at Paragraph 6.

'6. Notes made during investigations.

There is no need to retain investigative notes on interviews with persons, with two exceptions, after their contents have been incorporated into the usual records, such as signed statements, interview report forms, and/or memoranda. . . .'

VIII.

"On March 28, 1958, Special Agents Lindsey and Sullivan returned for a second time to the Glass residence. Mr. Glass signed this two-page statement, designated at this hearing as Hearing Exhibit B. During the course of this second interview, neither Agent Sullivan nor Agent Lindsey

made any stenographic, mechanical, or electrical, or other recording or transcription of the conversation between the parties.

IX.

"The United States Attorney's Office in Los Angeles, California first opened a file in the *Billy Maurice Ogden* case, for violation of 18 U.S.C. 1001, on February 24, 1959 (Hearing Exhibit G). By letter dated September 3, 1959, (Hearing Exhibit H), the United States Attorney's Office in Los Angeles, California, was authorized by the Department of Justice to present the matter to the Federal Grand Jury in Los Angeles, California. The indictment was returned in this case on September 9, 1959. This Court finds that prosecution was not contemplated within the meaning of the Order of the Ninth Circuit Court of Appeals until the Department of Justice concluded to write the said authorization letter to the said United States Attorney, which conclusion was arrived at a reasonable time prior to the date of such letter, but a long time subsequent to the destruction of the handwritten notes during the latter part of March, 1958. Accordingly, the handwritten notes in question were destroyed prior to the contemplation of prosecution."

III.
ARGUMENT.

A. Since the Same Information Was Available to Appellant in the Signed Statement of March 1958, the Substantial Rights of the Appellant Were Not Affected by the Non-Production of the Original Handwritten Notes of the FBI Agent Conducting the Interview.

In remanding this case to the District Court for a hearing to determine what happened to the original handwritten notes of the FBI agent in Mill Valley, California, on March 28, 1958, this Court stated: "A new trial will be required only if the court, after hearing, concludes that a producible statement by Glass existed, and that the substantial rights of the defendant were affected by failure to make that statement available for defendant's use in the cross-examination of the witness. Assuming that the trial court determines that a Jencks Act statement once existed, the Court may nonetheless conclude that the substantial rights of the defendant were not affected by its non-production if the same information was available to the defendant in the signed statement of March, 1958, or if the statement was destroyed in accordance with normal practice before the prosecution of defendant was contemplated, for a sufficient reason wholly unrelated to the prosecution, in good faith and with no intention to suppress evidence." The trial court concluded that the substantial rights of defendant were not affected by the non-production of these notes since the same information

was available to the defendant in the signed statement of March 28, 1958 and accordingly held that a new trial was not required. [C. T. 16-17.]

In connection with that conclusion of law the court found as a fact that Special Agent Sullivan took handwritten notes during the course of the conversation. There was a conflict of testimony between the recollection of Special Agents Sullivan and Lindsey, who stated that the handwritten notes were never presented to Mr. Glass and the testimony of Mr. Glass, who had a recollection that he had initialled each page of the handwritten notes. The court in order to resolve all doubt in favor of appellant found that the witness Glass had examined and initialled on that evening each page of the handwritten notes taken by Agent Sullivan [C. T. 14.] Special Agent Sullivan several days later dictated directly from his notes to a secretary who simultaneously typed that which he dictated. When the secretary had finished typing the two page document [Hearing Ex. B], Agent Sullivan compared the handwritten notes with the two-page typewritten document to satisfy himself that all the material had been transcribed. Subsequently he destroyed the handwritten notes as they had no further use to him, throwing them in a wastepaper basket. This was in accordance with the then existing Federal Bureau of Investigation rules and regulations as set forth in Hearing Exhibit E, paragraph 6. The trial court found that this was done in good faith with no intention to suppress evi-

dence since the same material was transcribed from handwritten form to typewritten form.

Appellant in order to present a more forceful argument has selected that portion of the alternative instructions of this court which favor him. He has prescinded from any discussion of the alternative instruction which is applicable to the facts as found by the trial court. Nowhere in that portion of his argument treating this question is there any discussion of the fact that the substantial rights of the defendant were not affected by the non-production of the handwritten notes since the same information was available to him in the signed statement of March 1958.

Appellant argues his substantial rights were denied by the destruction of the handwritten notes regardless of the contents of the typewritten statement and the motives for destruction, be they good or bad. His argument is based on the enactment of the Jencks Act statute on September 2, 1957 plus language of the Supreme Court in the case of *Campbell v. United States,* 365 U. S. 85 (1961) at page 98, in which the Supreme Court specifically stated that the record afforded them no opportunity to decide the question which appellant claimed was raised by the record in this case, to wit: whether or not the testimony of a witness must be stricken where a statement is not produced even though destruction of the statement was done in good faith. In *Campbell v. United States,* the Supreme Court had before it at the time of its

decision a situation in which Campbell had not received *any statement* although a *prima facie* case of entitlement to a statement had been made; Campbell, *supra,* at page 96. In this case it was not a question of non-production of the statement, the question is whether or not the statement *which was produced* contained all the information set forth in the original handwritten notes of the special agent. Since this matter is a factual question rather than a legal question, which the trial court resolved affirmatively, there is little more to be said. However, we take this opportunity to meet appellants' argument that the trial court erroneously interpreted the phrase before "the prosecution of defendant was contemplated" as used by this Court in its remand.

The Trial Court interpreted the phrase as meaning the time when the Department of Justice concluded to ask the United States Attorney in Los Angeles, California, to present the case to the Federal Grand Jury. [C. T. 17.]

Applying the facts of this case to that definition, the court found that the United States Attorney's Office in Los Angeles, California, first opened the file in the *Ogden* case, for violation of 18 United States Code, Section 1001 on February 24, 1959. [Hearing Ex. G.] By letter dated September 3, 1959 [Hearing Ex. H], the United States Attorney's Office in Los Angeles was authorized by the Department of Justice to present the matter to the Federal Grand Jury in

Los Angeles, California. The indictment was returned in this case on September 9, 1959. The court found that prosecution was not contemplated within the meaning of the order of the Ninth Circuit Court of Appeals until the Department of Justice concluded to write the said authorization letter to the said United States Attorney which conclusion was arrived at a reasonable time prior to the date of such letter, but a long time subsequent to the destruction of the handwritten notes during the latter part of March 1958. Accordingly the handwritten notes were destroyed prior to contemplation of prosecution. [C. T. 16.]

Appellant sets forth dictionary definitions of "contemplate", at page 19 of his brief. Although he has set forth various meanings found in three different dictionaries and in one cited case at page 20 of his brief, he has failed to specifically select the definition that he desires to rely on. Needless to say he did not provide at the hearing any assistance to the trial court by presenting his quoted definitions of contemplate but is now merely content to argue the trial court must somehow be in error.

On October 21, 1957, the appellant executed the Certificate of Non-Affiliation which is the subject matter of the charges of the indictment. The evidence at this hearing established that on January 17, 1958 an FBI agent (as opposed to the Department of Justice or United States Attorney's Office) had reason to be-

lieve appellant falsified the Certificate of Non-Affiliation. On approximately March 21, 1958, Special Agent Sullivan made handwritten notes of the Glass interview. A few days later after comparing these notes to the two-page typed statement, the notes were destroyed. On March 28, 1958, Glass signed the two-page document which was produced at the trial. On February 24, 1959, the United States Attorney's Office opened a file in connection with criminal case of Billy Maurice Ogden for violation of 18 United States Code, Section 1001. On September 3, 1959, the United States Attorney was authorized by the Department of Justice to present this case to the Grand Jury.

Certainly no one can more accurately state what the express intent of this Court was better than this court itself. Appellee submits the Trial Court's interpretation of the phrase used by this court "before the prosecution of defendant was contemplated" is a reasonable one and is a logical one. Appellee further submits that the application of the District Court to the facts of this case was a reasonable one and an accurate one, to wit: prosecution was not contemplated within the meaning of the order of the Ninth Circuit Court of Appeals until the Department of Justice concluded to write said authorization letter to the United States Attorney, which conclusion was arrived at a reasonable time prior to the date of the letter and a long time subsequent to the destruction of the handwritten notes in question.

Since an FBI agent had reason to believe that a criminal offense had been committed in January of 1958, appellant argues that the entire Government thereby was put on notice of such criminal offense and thereby must have been contemplating the prosecution. It is the function of the FBI to conduct investigation into certain federal criminal offenses. It is not the function of the FBI to decide who is to be prosecuted or when they are to be prosecuted. The record in this case further discloses the actual prosecution of Billy Maurice Ogden was being handled by the United States Attorney's Office in Los Angeles in liaison with Department of Justice officials. By no stretch of the imagination and by none of the definitions set forth in appellant's brief could it possibly be contended that prosecution was contemplated in Los Angeles by the United States Attorney's Office before they had even opened the file in the case, which the record shows was on February 24, 1959—almost eleven months after the destruction of Speical Agent Sullivan's handwritten notes.

The hearing held by the trial judge established beyond any doubt that the substantial rights of appellant were not affected by the destruction of the handwritten notes of Special Agent Sullivan inasmuch as there was conscientious comparison of the handwritten notes and the two-page typewritten statement prior to their destruction. Agent Sullivan testified prior to being instructed to interview Glass he had no knowledge of the

details of the offense or of a false certificate. His purpose was to interview Mr. Glass with respect to Mr. Ogden at the University of Oklahoma. [R. T. 113-115.] This record is completely barren of any deliberate or even inadvertent suppression of evidence. On the contrary, the record shows that in an orderly investigative process handwritten notes were utilized (as they are in the commercial and legal fields generally) to prepare a document to be eventually examined and signed and approved by someone else. This was done in this case and the document was presented and available to appellant's counsel in the trial of this case.

B. The Judgment Entered by the Trial Court on November 9, 1962, on the Remand of This Case Was a Valid Judgment.

Appellant argues that the instant judgment appealed from is a nullity and ought to be set aside since the defendant was not sentenced and thereby denied his right of allocution. *Green v. United States,* 365 U. S. 301 (1961). Appellant was originally sentenced on February 13, 1961, at which time the appellant exercised his right of allocution. [Rep. Tr. Feb. 13, 1961, 689-690.] In remanding this case to the Trial Court for this hearing it was stated at page 738: "If a new trial is denied, the District Court will enter a new final judgment, thus preserving defendant's right to appellate review of the District Court's action." The question is what did this Court intend in instructing the District Court to enter a new final judgment.

Appellee submits that the action of the District Court in this matter was proper. The Court gave an adequate hearing and full opportunity to appellant and his counsel to present their evidence. Furthermore, the Court specifically, on its own initiative, ordered the witness Glass to appear (at government expense) as requested by appellant although the government had refused such request prior to the court order. [C. T. 4.] Resentencing of the appellant would not shed any further light on any of the specific facts which were in question. The Court decided, and appellee submits, properly so, that the resentencing of the defendant was not necessary prior to rendering the judgment on the specific issues which had been remanded to it.

Furthermore, appellant still has available to him, in the event that this judgment is affirmed, the right to file a motion for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. Presumably, the Trial Court will fully consider any relevant new material appellant or his counsel decide to present on such an occasion.

C. Appellant Was Not Entitled to a Jury Trial on the Remand Issues.

In *Campbell v. United States,* 365 U. S. 85 (1961), at page 99, the Supreme Court directed a United States District Court to "supplement the record with new findings and enter a new final judgment of conviction if the Court concludes upon the new inquiry to reaf-

firm its former ruling. This will preserve to the petitioners the right to seek further appellate review on the augmented records." Similar language was used by this Court in the remand of this case. This is a controlling precedent by the Supreme Court in directing the manner in which the type of hearing which was held in this case should be conducted, to wit, by the Court out of the presence of the jury. Appellant claims that he has been denied his constitutional right to a trial by an impartial jury. If his position be accurate, then the Supreme Court ordered the District Court to conduct an unconstitutional hearing in the *Campbell* case. Obviously, such a construction of the action of the Supreme Court is unreasonable. Furthermore, even if such a far-fetched argument was valid, could this Court on its own initiative disregard established precedent of the Supreme Court? (*Cf., Killian v. U. S.,* 368 U. S. 231 at page 244 (1961), reh. den. 368 U. S. 979.)

The simple answer to this contention is the well-established principle that the trial judge is the primary arbiter on evidentiary matters.

In *United States v. Nardone,* 127 F. 2d 521, at page 523 (2 Cir. 1942), the Court stated

> ". . . competency of evidence is for the Judge alone; any question of fact upon which it depends, he must decide; if he admits it, the jury may use it like other evidence —for whatever it proves to their minds — they can have no concern with

rulings about evidence which, so far as it is possible, ought to be kept from their notice. *Steele v. United States,* 267 U. S. 505, 510, 45 S. Ct. 417, 69 L. Ed. 761; *Ford v. United States,* 273 U. S. 593, 605, 47 S. Ct. 531, 71 L. Ed. 793; *United States v. Cotter,* 2 Cir., 60 F. 2d 689, 691; *Wigmore,* §2550."

Conclusion.

For the foregoing reasons, appellee respectfully requests the judgment of the trial court be affirmed.

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Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

TIMOTHY M. THORNTON